

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

RAY W. CHRISTENSEN, TRUSTEE,

Appellant

CASE NO. 18267

-vs-

ROBERT T. FELTON and JEAN
WILSON FELTON,

Appellees

PETITION FOR REHEARING

FILED

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TO THE HONORABLE THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Ray W. Christensen, Trustee, appellant in the above cause and petitioner herein, does hereby respectfully request rehearing in the above entitled court and reversal of the opinion and decision of this court in this cause issued and filed herein July 16, 1963, which decision and opinion herein affirmed the opinion and decision of the United States District Court for the Eastern District of Washington, Northern Division.

This petition for rehearing is based upon the following grounds:

I.

The opinion as filed herein July 16 gives no consideration to the following facts:

(A) The subject contract was prepared and drawn by the sellers and their attorneys.

(B) There is no ambiguity in the language of the paragraph entitled "Term."

(C) There was no fraud or mistake alleged or involved in the execution of the contract.

(D) No error was assigned against the Referee's exclusion of the offered testimony, which same was permitted in the record solely and clearly by way of offer of proof.

II.

The opinion herein is based upon that part of the record which is only offer of proof and which should not be considered as testimony or evidence. The attorney for the trustee deliberately refrained from cross examination and refrained from offering contrary testimony and evidence, although such was and is available. The ruling contained in the Court's opinion now implies that parties in litigation will not be secure in reliance upon rulings of the presiding judge concerning evidence. It means that trial counsel will be compelled to cross examine matters submitted by offer of proof and will be impelled to meet the matters asserted in offers of proof with countering or rebuttal testimony or evidence.

III.

The other creditors of McDonnell Seed Company are not parties to the subject agreement. Equity requires that their rights be protected against the claims of the selling stockholders especially where the contract is clear and is their own deliberate act and agreement.

The claims of these selling stockholders should at least be subordinated to the claims of the other McDonnell Seed Company creditors.

Petitioner, for the foregoing reasons, respectfully requests this court to grant rehearing in this appeal and that upon such rehearing the court's opinion and decision of July 16, 1963 be reversed or amended to direct one of the following:

- (1) Reversal of the District Court's decision.
- (2) Subordination of the claims of appellees to the rights of other creditors of McDonnell Seed Company,
- (3) Remand the matter to the Referee for the taking of further testimony.

Respectfully submitted,

Brown & Thayer

Attorneys for Petitioner

I, LAWRENCE W. THAYER, of the law firm of Brown & Thayer, Counsel of record for Petitioner, hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

DATED this 14th day of August, 1963.

Lawrence W. Thayer
